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In the Supreme Court of the United States

OCTOBER TERM, 1958

PEWEE COAL COMPANY, INC., PETITIONER,

v.

THE UNITED STATES

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Claims (Pet. App. 1a-52a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered June 4, 1958. A timely motion for rehearing was denied on October 8, 1958. The petition for writs of certiorari was filed on January 6, 1959.

QUESTIONS PRESENTED

1. Whether operating losses sustained by petitioner's coal mine, while it was in Government possession for the limited purpose of preventing a national shut-down of coal mines by a labor dispute, must be borne by the United States when petitioner's operations during that period were solely for its own account and the losses were not due to the Government's control.

2. Whether petitioner proved that the possession of its mine by the Government deprived it of anything of compensable value, or subjected it to any greater pecuniary loss than found by the Court of Claims.

ORDERS AND REGULATIONS INVOLVED

The President's Orders authorizing the Secretary of Interior to take possession of petitioner's mine (Executive Order 9393, 8 F.R. 14877; Executive Order 9536, 10 F.R. 3939; Executive Order 9728, 11 F.R. 5593) appear in petitioner's appendix at pp. 15a, 35a and 41a. The orders of the Secretary of Interior taking possession of the mines (8 F.R. 15199; 10 F.R. 3983; 11 F.R. 5603) are set forth in petitioner's appendix at pp. 16a, 36a, and 43a. The Regulations for the Operation of Coal Mines (8 F.R. 10712) are in petitioner's appendix at pp. 17a-26a.

STATEMENT

These are two suits in the Court of Claims seeking just compensation under the Fifth Amendment for three temporary takings by the Government of Pewee's coal mine in order to avert a nation-wide strike of the coal miners. The first taking lasted from November 1, 1943 to June 21, 1944; the second, from April 10, 1945 to June 13, 1945; and the third, from May 22, 1946 to

June 30, 1947 (Pet. App. 3a-4a).[1] The Court of Claims held that as a result of these takings Pewee was entitled to just compensation totaling $4,145.48, the extra expenses it found petitioner to have incurred as a result of the Government's action. The pertinent facts—as found by the Court of Claims—are as follows:

Petitioner, a Tennessee corporation, had been engaged in the business of mining and marketing bituminous coal for a number of years. In carrying on this business it was the lessee of approximately 1465 acres of coal-bearing lands in Tennessee. The lands were leased to petitioner by the Coal Creek Mining & Manufacturing Company, and the East Tennessee Iron & Coal Company, under a lease which the landlords had jointly issued to petitioner, on November 28, 1939. The term was for 40 years with an option to renew for an additional 30-year period. Petitioner's right to mine the land was exclusive. By the lease petitioner was required to pay the lessors a royalty of $0.10 per ton on the coal produced under the lease, payment on a minimum production of 100,000 tons per year being guaranteed. The lease prohibited petitioner from subletting the leased property without the written consent of both lessors (Pet. App. 13a-14a).

Petitioner began production on the leased lands in January 1941, but, although the quality, quantity and availability of the coal made petitioner's leasehold potentially valuable, petitioner's mining operations were conducted at a financial loss each year it operated the

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[1] Claims arising out of a separate, earlier taking, from May 1, to October 12, 1943, were litigated in *Pewee Coal Co., Inc.* v. *United States*, 115 C. Cls. 626, 88 F. Supp. 426, affirmed, 341 U.S. 114.

property. The losses were due to inadequate equipment and poor management (Pet. App. 14a).

On November 1, 1943, April 10, 1945, and again on May 21, 1946, there were widespread labor difficulties and strikes at the bituminous coal mines of the country. Petitioner's mine was among those affected by the strikes and resulting work stoppages which, in the first two instances, threatened the national security during the prosecution of World War II and, in the third, threatened the national economy during the period of post-war conversion from war to peace (Pet. App. 2a-3a).

On each of the dates mentioned, the President issued an Executive Order authorizing and directing the Secretary of the Interior to take "possession" of all coal mines affected by the strikes and to operate or arrange for the operation of such mines. Each Executive Order declared that the Secretary should permit the existing managers of mines to continue their "managerial functions to the maximum degree possible consistent with the aims of this order" (Pet. App. 15a, 36a, 42a).

The Secretary of the Interior took action under each Executive Order by issuance, on the same day, of an order declaring that he took possession of each and all of the listed mines, that "The President of each of the mining companies * * * is hereby, and until further notice, designated operating manager for the United States for each" mine affected by the Order, and that "As operating manager for the United States, he is authorized and directed * * * to do all things necessary and appropriate for the operation of such mines and for the production, distribution and sale of their products." Petitioner's mine was among those affected (Pet. App. 17a, 38a, 44a).

The Secretary's order further defined the extent of the Government's possession by declaring certain previously issued Regulations for the Operation of Coal Mines Under Government Control (8 F.R. 6655, 10712, 11344) "in all respects to [be] applicable" to the mines covered in the order (Pet. App. 16a, 37a, 43a). In delimiting the terms of the Government's possession, these Regulations provided (Sec. 801.17): "* * * Nor shall any operations of any mine property in the possession and control of the Government, or the proceeds, earnings or liabilities of such mine property in any event be, or be regarded as being, for the account or at the risk or expense of the Government except as a specific written direction or order to that effect shall have been given by the Administrator." (Pet. App. 20a, 21a). These Regulations were in effect during the whole of the three periods of Government control involved in this case (Pet. App. 17a, 38a, 44a).

Possession of petitioner's mine under the first of these orders continued from November 1, 1943 until June 21, 1944, inclusive; possession under the second order continued from April 10, 1945 until June 13, 1945, inclusive; and possession under the third order continued from May 22, 1946 until June 30, 1947, inclusive (Pet. App. 17a, 38a, 44a).

During its periods of "taking", the Government required petitioner to allow its miners certain employment benefits which it otherwise would not have paid. These "fringe" benefits increased petitioner's costs during the first seizure in the sum of $1,080 (Pet. App. 34a), and during the third period of Government possession by $3,065.48 (Pet. App. 46a), or in the total amount of $4,145.48. During the second period, the

Government did not issue any directives which increased the petitioner's costs (Pet. App. 40a).

Petitioner's consistent history of financial losses from its operations (Pet. App. 14a) continued, under its own management, during the three periods of Government control. Petitioner suffered a net financial loss of $4,365.14 in the first period (Pet. App. 34a); $3,077.14 in the second period (Pet. App. 40a); and a net loss of $64,298.02 in the third period, during which the mine was shut down for five months because of a fire (Pet. App. 47a). The evidence does not show that these amounts would have been less if the mines had not been in the temporary possession of the Government (Pet. App. 34a, 40a, 47a).

On October 28, 1949 a petition was filed in Pewee's name in the Court of Claims seeking compensation for the period of Government possession between November 1, 1943—June 21, 1944 (Pet. App. 5a, 50a). On May 9, 1951, a second petition was filed in Pewee's name seeking compensation for the periods of Government seizure between April 10, 1945—June 13, 1945, and May 22, 1946—June 30, 1947 (Pet. App. 5a, 51a).

Although the petitions were filed in Pewee's name as if it were sole owner of the claims, the suits were actually initiated by one Frank Garland on behalf of a group including himself, to which Pewee had purported to assign (in return for the release of certain indebtedness) its claims against the United States arising out of the three periods of Government control (Pet. App. 9a-10a, 48a-51a). Pewee had agreed with Garland to "prosecute" any suits based on the

seizures, and to turn over all recoveries to him, provided that he bore the expenses of the litigation (Pet. App. 50a-51a).

Both petitions prayed for operating losses alleged to have occurred during the periods of Government control, and for compensation for the reasonable value of Pewee's property during these periods.

The cases were tried jointly (Pet. App. 1a). The court found the facts as summarized above, and, in addition, it found that the petitioner's evidence failed to show that its mine would have been rentable during the periods of Government possession (Pet. App. 35a, 41a, 48a). The Court held, on the basis of its findings and its earlier decision in *Pewee Coal Co., Inc.* v. *United States*, 115 C. Cls. 626, affirmed, 341 U.S. 114, that, in the circumstances of these three takings of the coal mine, Pewee was entitled to recover only the losses directly attributable to the Government's control, *i.e.*, the increased cost of the fringe benefits which the Government directed petitioner to pay its miners during the first and third periods of federal possession. It further held that the available evidence did not enable it to determine any rental value for petitioner's mine under the circumstances and for the periods involved in this litigation (Pet. App. 7a).[2]

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[2] Relying on the purported assignment to Garland, the Government contended that the petitions should have been dismissed because they falsely alleged that Pewee was the sole owner of the claims, that the claims had not been assigned, and that Pewee was the real party in interest. The court rejected this contention (Pet. App. 11a-12a). The Government has not petitioned for certiorari on this issue, but the defense that Pewee is not the real party in interest has not been waived.

ARGUMENT

At the present time there are no other suits pending in the Court of Claims to recover just compensation for the legal possession of strike-bound industries by the Government during national emergencies. And since there have been no such seizures by the Government since April 8, 1952, the six-year statute of limitations, 28 U.S.C. 2401(a), will bar any future suits for such takings. Thus, quite apart from the fact that this particular record and this litigation are intrinsically unsuitable for review by certiorari,[3] this case does not present issues of sufficient general importance to merit review by the Court at this time. Further, petitioner's assertion that the Government must underwrite business losses which petitioner suffered while operating for its own account, under its own management, during the periods of Government possession, was rejected by the majority of this Court in an almost identical case. *United States* v. *Pewee Coal Co.*, 341 U.S. 114. And in any event petitioner's demand for the reasonable value of the use of its property during the periods of Government possession is not supported by a factual showing that it was deprived of anything of value or that it suffered any further pecuniary loss as a result of the Government's possession.

[3] As the court below observed, "* * * we have the unusual situation of the plaintiff merely acquiescing in the prosecution of the present suits in its name by counsel employed by someone else, who is bearing the costs of the litigation in the hope and with the expectation that the plaintiff will pay over to him and his associates the proceeds of the litigation * * *. Such a situation is not in accord with the principles of the orderly administration of justice" (Pet. App. 12a-13a). See also footnote 2, *supra*, with respect to the defense that Pewee is not the real party in interest.

1. *Operating losses.* In *Pewee Coal Co.* v. *United States*, 115 C. Cls. 626, 88 F. Supp. 426, petitioner, as in this case, sought to recover operating losses sustained while its mine was in the possession of the Government between May 1, 1943 and October 12, 1943, because of a nation-wide miners' strike. The Court of Claims held that there could be "no recovery on this basis, because there is no showing that the Government's seizure of the mines caused the loss in operations". 115 C. Cls. 626, 676, 88 F. Supp. 426, 430. This conclusion was based upon this Court's earlier decision in *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U.S. 280, and upon the Court of Claims' finding that petitioner operated for its own account and under its own management, although subject to Government control. In addition, however, the court found that Pewee's costs had been increased by directives of the Government requiring that certain "fringe" benefits be allowed the miners during the period of Government control. These costs were held to be directly attributable to the Government and therefore petitioner was awarded a judgment in that amount.

Petitioner did not seek review of this judgment. The United States, however, insisted that there was no "taking" within the meaning of the Fifth Amendment, and principally upon this ground it petitioned this Court to review the Court of Claims' decision. The importance of the "taking" issue at that time (June 1950) was underscored by the possibility of further litigation arising out of the three subsequent coal-mine seizures (involved in the instant case), and by the significant then-pending litigation arising from the seizure of the midwestern motor carrier systems (see *Wheelock*

Bros. v. *United States*, 115 C. Cls. 733, 88 F. Supp. 278, judgment vacated, 341 U.S. 319). Petition for a Writ of Certiorari, No. 168, October Term, 1950, at p. 17.[4]

This Court granted certiorari, 340 U.S. 808, and affirmed the judgment of the Court of Claims, 341 U.S. 114. No opinion was issued by the Court. Instead, the views of the individual Justices were stated in two concurring and one dissenting opinion. All were unanimous that a taking had occurred, and a majority of the Court were agreed that, on the record before it, the judgment of the Court of Claims should be affirmed.

Justice Black, joined by Justices Frankfurter, Douglas, and Jackson, felt that affirmance was appropriate under a general principle that the Fifth Amendment requires the United States to bear operating losses, as distinguished from its obligation to pay just compensation, which were incurred during the period the Government operates private property in the name of the public without the owner's consent. Justice Reed, concurring separately, felt that the principle invoked by the other members of the majority could not be generally applied to temporary takings; rather, compensation, including operating losses, must be determined "under all the circumstances of the particular

[4] The Government was also concerned about the effect of the Court of Claims' ruling that there had been a "taking" upon future use of the seizure method to control strikes in national emergencies. However, since this Court's decision in *Youngstown Sheet and Tube Co., et al.* v. *Sawyer*, 343 U.S. 579, there have been no seizures similar to those involved in the first *Pewee* case and in the instant case. Further, there is at present no statute in force similar to the War Labor Disputes Act, 57 Stat. 163, under which the instant seizures were ordered (Pet. App. 15a, 35a, 43a). Should such seizures become necessary in the future, the President and the Congress will be able to prepare authorizing legislation in the light of the Court of Claims' decision in the first *Pewee* case, as it was considered and affirmed by this Court.

case." Justice Reed held, however, that in every such case the measure of compensation can only be the loss to the owner attributable to the Government's taking. The "fringe" benefits paid the miners were within this category. Justice Burton, Chief Justice Vinson and Justices Clark and Minton, dissenting, agreed with the principles stated by Justice Reed, but held that, on the record before them, Pewee had not shown that it had been deprived of anything of value or that it had been subjected to pecuniary loss as a result of the taking.

The opinions of the four dissenting Justices, together with that of Justice Reed, hold that operating losses sustained by Pewee in a taking upon terms almost identical to the takings in the instant case are not compensable under the Fifth Amendment, unless it is factually established that such losses would not have occurred but for the Government's possession. These Justices viewed technical possession, of the kind involved here, as permitting the company, both as a matter of law and a matter of fact, to operate under its own management for its own account. Thus, a majority of the Court held that in such circumstances normal operating losses cannot be attributed to the Government, nor can the Government claim profits accruing to the company.

This holding is dispositive of the present case. Here, the Government's possession was strictly circumscribed to permit the company to run its own affairs for its own account. So far as this record shows, it could make any other business decision, subject to Government approval where necessary (Pet. App. 20a, 23a),[5] called for

[5] On this record, it is unnecessary to consider what might be the consequences of a Government refusal to permit petitioner to carry out a proposed business decision.

in the exercise of its business judgment. Under the limited possession taken here, the only right of proprietorship lost by the company was the right to cease operations—and thereby suffer even greater losses—because of the mine operators' dispute with the United Mine Workers. The taking of this right obviously did not subject the petitioner to financial loss or deprive it of anything of compensable value. Cf. *Marion & Rye Valley Ry. Co.* v. *United States,* 270 U.S. 280, 282.

2. *Compensdtion for use of the property by the Government. (a).* Although the Government was in legal possession of petitioner's property, it did not in any way disturb petitioner's use or enjoyment of that property. Nor did it, except to the limited extent found by the court below, interfere with petitioner's operations as a going concern. The only "use" the Government made of the mines was to assert its sovereign control over them for the purpose of recalling the striking miners to work during a period of national emergency. This use was completely exclusive of, and consistent with, petitioner's proprietary interests. To the Government, in the performance of its responsibilities for the safety of the nation, the seizure was of inestimable value. But this does not entitle petitioner to compensation. As Justice Holmes observed in *Boston Chamber of Commerce* v. *Boston,* 217 U.S. 189, 195, where just compensation is in issue "the question is what has the owner lost, not what has the taker gained." Petitioner did not establish in the court below that it had lost anything by reason of the Government's intervention in its dispute with the United Mine Workers.

If is true that the possession by the Government put

it in a position to use the property in a manner inconsistent with petitioner's rights as owner. But where such a use has *not* occurred, this kind of bare possession, which does not of itself deprive the company of anything of value, is not in itself a basis for just compensation. *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U.S. 280.

(b). Even if petitioner were entitled, as a matter of law, to compensation for the temporary use of its property, this could be no more than the rental value for the period of Government possession. *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 7. However, petitioner's evidence did not enable the court below to determine the rental value of its mine "under the circumstances and for the periods involved in this litigation" (Pet. App. 7a). As the Court of Claims observed, it is fair to infer from the evidence that petitioner's mine would have had no rental value during the periods of the Government's seizure (Pet. App. 6a). First, the petitioner's mine would have required extremely expensive repairs before a prospective lessee could anticipate operating it at a profit. Secondly, the evidence does not establish that petitioner's lessors would have consented to subleasing of the mine (see *supra*, p. 3). Finally, petitioner's mine would have been unrentable during the period of the temporary takings, but for the intervention of the Government, because there is no rental market for strike-bound coal mines. That petitioner may have received offers for *long term* sub-leases of its potentially valuable leasehold does not in any way derogate from this conclusion. Far from depriving petitioner of anything, an affirmative benefit was conferred upon it by the Government's action, which saved

it losses even greater than those it suffered.[6] On the proofs in this case, therefore, the Court of Claims correctly held that petitioner was not, as a matter of fact, entitled to compensation for the use of its property during the periods it was in the Government's possession.

CONCLUSION

For the foregoing reasons, the petition for writs of certiorari should be denied.

Respectfully submitted,

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FEBRUARY, 1959.

[6] Petitioner was required to pay its lessors a guaranteed minimum annual rental of $10,000 per year. In addition, fixed charges and current maintenance costs would have continued all through the period that the mine was idle, without income from current operations to off-set them. See Parker, *The Coal Industry*, p. 6; Hearings Before House Committee on Ways and Means on Extension of Bituminous Coal Act of 1937, 78th Cong., 1st Sess., at pp. 241-244.

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